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IN THE

Supreme Court of the United States

October Term, 1954

No. 386

J. RICHARD KAFES,

Petitioner,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

J. RICHARD KAFES, *Pro Se,*
219 West State St.,
Trenton 8, New Jersey.

SUPREME PRINTING CO., INC., 114 WORTH STREET, N. Y. 13, BEEKMAN 3-2320
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J. Richard Kafes, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on July 13, 1954.

Opinion Below

The opinion of the Court of Appeals (*infra*, pp. 1a to 9a) has not yet been reported.

Jurisdiction

The judgment of the Court below was entered on July 13, 1954. A rehearing was denied on August 6, 1954. On September 1, 1954, Mr. Justice Burton extended the time for filing petition for writ of certiorari to and including October 5, 1954. Both the Solicitor General and the United States Attorney for the District of New Jersey were, pur-

suant to Rule 34 (4), duly notified of this extension. The jurisdiction of this Court rests on 28 U. S. C. Par. 1254 (1) and Rule 22 (2) of this Court.

Questions Presented

1. Whether defendant was given a fair trial.

2. Whether the charge of the Trial Court was erroneous, prejudicial and unfair.

3. Whether the convictions for wilfully attempting to evade income taxes, in violation of Section 145 (b) of the Internal Revenue Code, were supported by proof of the commission of a wilful affirmative act by the defendant, in addition to the failure to file a return, as required by *Spies* v. *United States* (317 U. S. 492). Since the substantive provisions of Section 145 (b) have been reenacted as Section 7201 of the Internal Revenue Code of 1954 this question remains one of public importance.

4. Whether Counts 1 to 5, inclusive, of the indictment (G1a to 5a, inclusive), as supplemented by the single particular (D5a), were sufficient to properly charge the defendant with the offenses alleged.

Statutes Involved

1. Sections 145 (a) and 145 (b) of the Internal Revenue Code, 26 U. S. C. 145 (a) and 145 (b), provide as follows:

"Par. 145. *Penalties*

(a) Failure to file returns, submit information, or pay tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the

computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

2. Article VI of the Amendments to the Constitution of the United States of America, in part, is as follows:

"In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; * * * and to have the Assistance of counsel for his defence.."

Statement

Petitioner was indicted on five counts for wilfully and knowingly attempting to defeat and evade income taxes in violation of Section 145 (b) of the Internal Revenue Code (*supra,* p. 3 for the respective years in question, by failing to file an income tax return with the Collector of Internal Revenue, as required by law, by concealing his income, and by handling his affairs in such manner as to avoid making the records usual in the transactions in which he participated so as to conceal and mislead with respect as to his true taxable income; and in two counts with wilfully and knowingly failing to file an income tax return with the Collector of Internal Revenue, for the years 1949 and 1950, in violation of Section 145 (a) of the Internal Revenue Code (*supra,* p. 2). At the trial, the Government introduced into evidence, a statement made by defendant to agents of the Internal Revenue Department, signed by him, wherein he admitted that no returns were filed for the years in question (Exhibit G-3, Sheet 3, G273a).

Two agents of the Internal Revenue Bureau, who were in charge of the Government's investigation, were adduced as witnesses. Neither gave any testimony from which a jury might reasonably conclude that petitioner committed any affirmative act so as to raise the alleged misdemeanor offense under Section 145 (a) to the felony denounced by Section 145 (b); but on the other hand, completely negatived such a conclusion by direct and unequivocal testimony.

Every witness who testified as to payments made to defendant said they were in the "ordinary course of business" (*infra,* p. 8a), for services rendered. The agents of the Internal Revenue Department testified to the extent of their "verification" (D337a-338a) of defendant's disclosures, from his records, of income had by him.

Representative excerpts from the trial judge's comments, statements, and remarks, will indicate that petitioner did not have a fair trial (*infra*, pp. 11a to 25a).

At the outset of the trial, the Court accused defendant's counsel (D27a), and defendant of knowingly acting improperly, to the extent that defendant was deprived of the benefit of counsel from a practical standpoint (*Glasser* v. *U. S.*, 315 U. S. 60); throught the trial, and in his charge, he assumed the role of an active advocate for the Government (*Berger* v. *U. S.*, 295 U. S. 78, 79; *Quercia* v. *United States*, 289 U. S. 466); he unduly examined government witnesses, following defendant's cross-examination, with a view of off-setting any favorable impression of defendant the jury may have gotten, by repetitiously compelling the various witnesses to repeat those portions of their direct examinations as went to income had by defendant.

There was no evidence before the jury to support a verdict of guilt as to the felony counts.

The learned Court below in its opinion said "defendant had failed to keep sufficient records to allow an audit of his receipts and expenditures in the ordinary way. The extent of his income had to be proved by showing how much he had taken in" (*infra*, p. 8a), as its sole answer to defendant's position, notwithstanding the fact that Mr. Levere A. Thompson, special agent of the Intelligence Division, testified as follows:

> "Q. Did you find any evidence under any circumstances or from any source that the records which I did have weren't complete? A. I would say that I found a couple of items, at least one that would not show on your records." (D184a),

and that Mr. Richard G. Heller, the agent in charge, testified as follows:

> "Q. Now, Mr. Heller, I ask you whether or not you in your 113 days, and the other agents with as

much time as they spent, whether you were able to uncover, if I may use that word, or find one penny of income that I had which I did not report to you and which, except in the case of the $225, did not get into my bank account? A. I don't recall any item of that type sir" (D340a).

Counts 1 to 5 of the indictment embrace 5 separate and distinct offenses, each involving a specific year between 1946 and 1950, inclusive. Petitioner engaged in hundreds of transactions during that period.

There was no evidence, or reasonable suggestion, that defendant attempted, in any manner, to set up books or records, which would tend to reflect an untrue picture of the transactions in which he was engaged, or tend to distort his actual income. All of the evidence concerning defendant's records was negative. It was said he did not have sufficient records yet it was admitted by each of the agents that all income he had over a period of five years was disclosed to them by defendant. It was admitted that he had and produced, monthly bank statements for the entire period, all his cancelled checks, his bank book stubs, entries in yearly diaries, case files upon which fees were recorded, and for a portion of the time involved, duplicate receipt books (D184a). There was no evidence of one penny of income being discovered which was not reflected accurately in the records maintained by defendant (D340a). No witness ventured the suggestion that defendant had records which he manipulated; or that his records were incomplete; the only complaint with any possible justification being that they were not methodically assembled.

Counts 1 to 5, inclusive, of the indictment are in generic terms (G1a to 5a). The three elements of the crimes alleged are (1) "failure to file" returns, (2) "by concealing his income" and (3) "by handling his affairs in such manner as to avoid making the records usual in the transactions in

which he participated so as to conceal and mislead with respect to his true taxable income". Petitioner's first motion was for a bill of particulars clarifying the manner in which it was alleged he "concealed his income"; what affirmative act he was charged with having committed; what specific act or acts he need be prepared to defend (G7a to 9a). The Trial Court denied defendant's motion for these particulars (G41a).

Thereafter defendant moved for an order dismissing Counts 1 to 5, on the ground that they did not satisfy the requirements of Article VI of the Amendments to the Constitution of the United States (*supra*, p. 3).

At the conclusion of the Government's case defendant moved for an order directing a verdict of acquittal. Upon its denial defendant rested and offered no testimony, relying upon the record, as it then stood.

Reasons for Granting the Writ

Your petitioner presents four points as reasons why the writ should be issued.

1. Points 1 and 2, as they are listed herein (*supra*, p. 2), will be discussed as a unit in that petitioner believes the two, in combination, form a pattern of the extent to which a defendant can be prejudiced in the eyes of a jury by remarks, and comments of a trial judge; and how completely a defendant's right to a fair trial can be abrogated and nullified.

Appendix C hereof (*infra*, p. 11a to p. 25a) contains representative excerpts from the record of the remarks and statements made by the Court from the outset of the trial to the conclusion of his charge. Petitioner respect-

fully urges that consideration be given to the practical effect of the abundant record of the prejudicial statements made by the Court, his pointed remarks, the unjustified reprimands of petitioner and his counsel, and the willingness of the Court, at every turn, to raise issues between the Court and petitioner, personally, and as to his knowledge of the law and the rules of evidence. The atmosphere that was created can only be imagined by a review of the transcript of each session of court. The Trial Court differed with petitioner on practically every question that arose as to admissability of evidence; to the application of the law, to factual testimony, and as to the issues involved in the trial. Time and again, he charged petitioner and his counsel, in the presence of the jury, with knowingly acting improperly. He reminded petitioner, within hearing of the jury, that he rarely agreed with him. After listening for eight days, to the many personal matters raised by the Court, between himself and defendant, the jury undoubtedly felt that they were trying that issue. The trial descended to a question of whether the Judge or defendant was right on the many differences the Court called to their attention, and the jury was put in a position of deciding, not the real issues raised by the indictment and plea, but between the judge and defendant as a lawyer.

The Court suggested that petitioner hoped to get confidential with him (*infra*, p. 11a); he charged petitioner's counsel with not stating a fact when he recited the terms of a stipulation entered into by the district attorney and petitioner, at the district attorney's suggestion, so that a Government witness might be excused; notwithstanding the fact that the district attorney confirmed, in all respects, the stipulation as stated (*infra*, p. 11a to 14a); in effect, charging the jury that petitioner's counsel was guilty of stating an untruth (because to laymen, the charge that you are not making a "statement of fact" when made by a

judge, carries all the sinister implications of a conviction of stating an untruth, with sinister motives). The effectiveness of anything counsel thereafter said, in the presence of the jury, would of necessity, be tainted with the jury's recollection of the Court's unjust characterization of counsel's prior remarks. Upon petitioner's offer to stipulate admitted receipts, the judge said, "* * * that is all very fine, but * * *" (*infra,* 15a); he sarcastically asked Mr. Donald W. Hornbeck, a Government witness, who testified that he was a member of the Bar of the State of Ohio, of long standing, "You can read and write, in other words—," (*infra,* p. 15a); and responded to petitioner as his answer to a motion that the question be stricken from the record, "I just wanted to make that conclusive as to whether Mr. Hornbeck could read and write," (*infra,* p. 16a); he responded to petitioner's suggestion that a witness had not answered a question, "possibly not to your (petitioner's) satisfaction," (*infra,* p. 16a); when petitioner asked a witness to procure a letter, about which he had been testifying, the Court said, "No, not that and don't do that. That is improper." (*infra,* p. 16a); and when petitioner, observing a witness looking at his file, asked whether he had some hope that the letter in question was in his file, the Court said, "No, no, no. That is not proper." (*infra,* p. 17a); when petitioner in aid of clarifying a situation said, "May it please your honor, may I suggest to your honor, if they were for services—" the Court said, "When you want to testify, you may," (*infra,* p. 17a); when petitioner attempted to refresh the recollection of a witness as to a factual matter, the Court said, "Now, don't argue with the witness. You ask him a question. Let him answer," and following that, upon petitioner asking that an exception to the Court's remarks be allowed, the Court said, "Well, nevertheless, obey them," with no possible justification (*infra,* p. 17a). During cross-examination of a Government witness, petitioner, asked

why certain allowances were not made, and whether it would not be fair to make further allowances, the Court said, "You can ask him questions as to what he allowed or did not allow. The proper time for you to point out whether it is fair or unfair is in your argument to the jury which is not conducted in the middle of the examination or cross-examination." (*infra*, p. 18a); when petitioner reminded one of the agents during cross-examination that he had another lawyer with him on a certain trip to Washington, for the purpose of refreshing his recollection of a prior discussion which had been had concerning that trip, the Court said, "Mr. Kafes, I don't like to interrupt constantly, but you know much better * * *," (*infra*, p. 18a); when petitioner, during cross-examination suggested to the agent who was testifying as to allowable deductions which he made for petitioner's benefit, that one item allowed was not a business expense, the Court said, "That is an improper question. Proceed with your examination," (*infra*, p. 18a), and upon petitioner's saying that he did not expect that item to be allowed, the Court said, "Well, that is very fine, Mr. Kafes, if you want to stop this cross-examination and assume the stand, and I will allow you to do that at the proper time, whenever you decide * * *," (*infra*, p. 19a); within the discussion that followed, the Court said, "Unfortunately, we disagree on that particular point," and when petitioner said, "We disagree on that?" the Court commented, "There is another thing, Mr. Kafes, we apparently disagree upon, and it is your refusal to wait until I finish," with no justifiable reason (*infra*, p. 19a). At no time during the long trial, did petitioner intend, nor did he as a matter of fact, interrupt the Court—he constantly strove to accord the utmost respect to the Court, and he submits that notwithstanding the many unjustified rebuffs and erroneous characterizations of his conduct as being improper, he followed all of the rules of propriety.

The Court on numerous occasions, on his own motion, sustained objections and when petitioner asked who made the instant objection, the Court said, "Mr. Rounds, and if he didn't, it is improper" (*infra,* p. 19a), and further, "Well, if Mr. Rounds didn't make one, I did" (*infra,* p. 20a). Following a discussion between the Court and petitioner as to the rules governing cross-examination, the Court said, "Well, unfortunately, Mr. Kafes, your understanding doesn't make it necessarily so" (*infra,* p. 20a); when petitioner asked the right to inspect a certain writing concerning which the Court was interrogating one of the agents, the Court said to the witness, "At the finish of my examination, you will make the sheet available to both these gentlemen," and upon petitioner's further request to see the writing before the evidence from it went to the jury, the Court said, "You may have it at the close of the examination" (*infra,* p. 22a), see *United States* v. *Coserta,* 199 F. 2d 905, 909 (C. A. 3); at times the Court, upon hearing petitioner's reason in support of the propriety of a question or objection, would say, "Are you finished?" and completely disregarded the pending question without making a ruling (*infra,* p. 23a); during an extensive examination by the Court of a Government witness, following the completion of cross-examination by petitioner, in response to a question, the Court said, "It is the Court's examination, Mr. Kafes. It is neither direct nor cross" (*infra,* p. 23a); following a statement of petitioner's view as to the rule of evidence, the Court said, sarcastically, "That is one of the *few* times, Mr. Kafes, you and I agree on a point of law" (*infra,* p. 23a). Petitioner respectfully submits that the record will indicate that he was correct, with a possible few exceptions, in the respective positions he took. Petitioner was frustrated time and time again; his actions was termed improper on many occasions, notwithstanding the fact that his conduct of the trial was generally sound and in accordance with the rules of trial

procedure. When petitioner suggested to the Court, graciously, that the Court may have said something that was not supported by the law, the Court said, in a loud and belligerent voice, "I haven't suggested anything of the sort in the least degree. I know just as well as you do that there is no devisable interest in an estate in entireties by a husband and wife, but I do know that when property is sold and converted to personalty, the estate then changes; • • •" (*infra*, p. 24a); when petitioner reminded the Court upon his second series of questions to a witness, that direct examination had been concluded, cross-examination had been concluded, and the Court's previous questions had been concluded, the Court, with no justification said, "Yes, Let us not get into an argument about it" (*infra*, p. 24a), "I will cross that bridge when I get there, not before" (*infra*, p. 25a). Petitioner never intended to get into an argument with the trial judge and it was unfair for the Court to suggest that in the presence of the jury. Upon cross-examination, petitioner asked a Government witness whether he recalled something that had previously been testified to, whereupon the Court, after objection by the district attorney on the grounds that the question was argumentative, said, "Yes, that is right. That is not proper and I will sustain the objection," and upon petitioner respectfully informing the Court that the question was merely intended as being preliminary to another, he was told, "Yes, I understand, I understand your purpose, but it is improper in my estimation and I will sustain the objection" (*infra*, p. 25a).

Every admonition to trial judges as to impartiality, prejudice, hostility to a defendant, and solicitude for the essential rights of an accused, laid down by this Court, were disregarded or erroneously construed by the Trial Court in the present instance. *Berger* v. *United States*, 295 U. S. 78; *Quercia* v. *United States*, 289 U. S. 466; *Starr* v. *United States*, 153 U. S. 841; *Hicks* v. *United States*, 150 U. S. 442;

Glasser v. *United States,* 315 U. S. 60; *Johnson* v. *Zerbst,* 304 U. S. 458; *Patton* v. *United States,* 281 U. S. 276.

The Court below in its opinion noted that there were "numerous exchanges of remarks between the Court and the defendant whose position on some legal points was quite different from that of the judge". Petitioner asks that his role be judged with consideration of the atmosphere that existed throughout the trial. He was, in his sincere opinion, rebuffed constantly; he was charged with acting improperly when he felt he was completely in the right; he was ridiculed and "rapped on the knuckles", as he believed, unjustifiably.

The Trial Court assumed the role of an active advocate for the government, he examined the various witnesses profusely, always as to such points as were calculated to bolster the government's position. Invariably at the conclusion of cross-examination by petitioner, the Court would, by his questions, review the testimony given on direct, puting special emphasis on income received by defendant. The jury was never permitted to lose sight of the fact that there was testimony that petitioner received large amounts of income—the fact that all payments were made in the "ordinary course of business" for services rendered, that it was deposited in defendant's bank account and that records of the receipt thereof were maintained by petitioner, were disregarded. In his charge the Court refreshed the recollections of the jury to the fact that one witness testified that the payment he made to petitioner, amounting to $225, was "in the ordinary course of business" but neglected to say that fourteen other witnesses testified that payments made by them to petitioner, involving thousands of dollars, likewise were made in the "ordinary course of business" (*infra,* p. 8a); thereby creating the impression that the witness mentioned was the only one that made such a statement.

The Court below further noted in its opinion that the Trial Court assisted petitioner in phrasing a question to bring out a point. The record will indicate that the only justification possible for such a conclusion was that on two occasions the Court, in his words, clarified questions originally propounded by petitioner. Beyond that, the record is devoid of any effort on the part of the Trial Court to assist petitioner.

It is respectfully urged that the Trial Court was cognizant of the strong bulwarks erected by this Court to insure every defendant a fair trial, and was likewise familiar with every means of creating a showing of fairness on a cold record. He purposefully ruled with petitioner, on occasion, as to unimportant matters and, in fact, did clarify two questions asked by petitioner with the design of circumventing the sacred guarantees to every defendant assured by the Constitution and so zealously guarded by this Court. This, notwithstanding the fact, that he erroneously ruled against petitioner on scores of occasions, on important and vital matters; that he reprimanded petitioner periodically throughout the trial; that he wrangled with petitioner upon every occasion possible; that he took issue with many proper statements made by petitioner; that he denied the petitioner the right to bring in proper testimony and that he attempted to confuse him at every turn.

The Court below cites a paragraph from the Trial Court's instruction to the jury (*infra*, p. 3a), and by implication it is suggested that those few words were sufficiently potent to erase from the jurors' minds all the prejudicial impressions that had been so thoroughly, and with such precise design, embossed thereon during the long trial. That caution, in the Court's charge, delivered in a bland manner, was said not for the purpose of impressing the jury but with the view of embellishing the record to the

extent that a court on appeal might be impressed therewith.

The Trial Court recognized that he "rapped the knuckles" of petitioner, to the extent that he chose the language above cited.

Petitioner verily believes that that was done in an effort to indicate, on the record, that petitioner had been treated fairly and with the calculated hope that it would be given the weight that it did receive from the Court of Appeals.

Petitioner respectfully urges that the complete record herein clearly demonstrates that he did not receive a fair trial and that the provisions of Article VI of the Amendments to the Constitution were denied.

2. Petitioner urges that the record does not support the verdict of guilt as to the felony counts of the indictment (1 to 5, Section 145(b)). Although this Court in *Spies* v. *United States, supra,* and in *United States* v. *Johnson,* 319 U. S. 503, clearly defined the difference between the misdemeanors denounced in Section 145(a) and the felony made criminal by Section 145(b) the Trial Court permitted the question of defendant's guilt under Counts 1 to 5 (Section 145(b)) to go to the jury, in spite of the fact that there was no evidence that petitioner committed any affirmative act in an attempt to evade and defeat the tax.

Appendix C hereof (*infra,* pp. 11a to 25a) contains representative portions of the testimony of the Internal Revenue Agent in Charge, and of the Special Agent of the Intelligence Unit, the only witnesses adduced by the Government as to the gravamen of the offenses charged. All of the other witnesses testified exclusively in *verification* of payments disclosed by the records of the defendant, or as to his banking transactions. All payments to defendant were made in the "ordinary course of business" (*infra,*

p. 8a). There was no evidence of any affirmative act by petitioner calculated to conceal his income or to avoid the payment of taxes.

The Court below, in deciding this question said, "Defendant had failed to keep sufficient records to allow an audit of his receipts and expenditures in the ordinary way. The extent of his income had to be proved by showing how much he had taken in. This was a difficult task * * * " (*infra*, p. 8a). No other illustration was noted by the Court below in support of the Government's position as to this point.

The Court of Appeals undoubtedly had in mind the testimony of Mr. Heller, the agent in charge, viz. that he spent 113 days, and that other agents throughout the country spent further time on this matter, and concluded that that time was consumed in proving defendant's income and expenditures. The fact is that the time spent by Mr. Heller, and the others, was not in an effort to establish petitioner's income and expenditures (which had theretofore been disclosed by petitioner from his own records), but in an effort to discover any omissions, involuntary or fraudulent—and the impelling conclusive factor is that there were no omissions discovered or any justifiable additions to petitioner's income beyond those disclosed by defendant's statement from his records.

Months were spent in interviewing every client petitioner had; searches were made of every available record of all banks, brokerage houses, courts, and administrative agencies, where petitioner could possibly have had any dealings, in an effort to unclose any income or fees petitioner may have had and which his records did not disclose. The agents of the Government were indefatigable; they covered a radius of hundreds of miles from the Trenton area (where petitioner maintained his office); their search encompassed *every* source from which petitioner

could have had any income. At no place did they discover *one* undisclosed item or *one* item not contained in petitioner's records.

The real significance of the answers of Mr. Heller, the Internal Revenue Agent in Charge, to the following questions by petitioner, can only be garnered in the light of that background. Petitioner asked Mr. Heller:

> "Q. In other words, everything that I told you the other agents wanted to *verify* to see, if, possibly, I made some untruthful disclosure to you, or that I failed to disclose something to you? (*infra*, p. 27a). A. Well, that would be—
>
> Q. Isn't that a fair thing to say? A. Yes, sir.
>
> Q. Now, I ask you directly, Mr. Heller, whether or not, in your 113 days, you found anything that I said to you to be not true in the slightest degree? A. Well, I know of no particular instance other than room for human error, but nothing untrue (*infra*, p. 28a).
>
> Q. Now, Mr. Heller, I ask you whether or not, you in your 113 days and the other agents with as much time as they spent, whether you were able to uncover, if I may use that word, or find one penny of income that I had which I did not report to you and which, except in the case of the $225 did not get into my bank account? A. I don't recall any item of that type, sir" (*infra*, pp. 28a, 29a).

Mr. Levere A. Thompson, Special Agent, testified as follows:

> "Q. Now, I ask you whether or not a person's bank account, deposit slips, cancelled checks, stubs, diary entries, and other notations do not constitute a fairly complete set of records? A. Fairly complete, if they are complete.

> Q. Did you find any evidence under any circumstances or from any source that the records which I did have weren't complete? A. I would say that I found a couple of items, at least one that would not show up on your records" (*infra*, p. 33a).

It follows without speculation that the Special Agent of the Intelligence Unit, at the most, fixed the dereliction of petitioner, as to maintaining records from which his income could be ascertained to "* * * a couple of items, at least one" (*supra*).

Each of the first five counts of the indictment charged a separate offense, relating to a designated year. During the five year period covered in the testimony of Mr. Thompson, petitioner engaged in hundreds of transactions. Certainly an omission of "* * * a couple of items, at least one * * *" (*supra*) in a person's records does not constitute the criminal act of commission contemplated by this Court in it's opinion in the *Spies* case (*supra*). There was no evidence, or even a suggestion of any manipulation, any falsification, any resort to subtrafuge; or a as matter of fact, any other method or scheme of "attempt" to defeat and evade. Paraphrasing the complete evidence adduced by the Government as to Counts 1 to 5, inclusive, from the most damaging viewpoint of petitioner, it can only be said, "He did not file returns as required by Section 145(a) and omitted a couple of items, at least one, during a five year period," in his records. Does that sort of testimony meet the test of the minimum requirements under *Spies* v. *United States, supra,* and *United States* v. *Johnson, supra*?

Petitioner respectfully and sincerely avers that the distinction between the acts of omission denounced by Section 145(a) and the affirmative acts of commission encompassed in Section 145(b) was not recognized or differentiated in the instant matter, and prays that this Court will, as a matter of grace, permit a full and complete debate, by

granting a writ of certiorari herein, of the vital questions concerning petitioner's liberty, presented by the full and complete record herein.

Petitioner recognizes and admits that if the facts in this case reflected, either singly or in combination, the circumstances enumerated by way of illustration in the *Spies* opinion (*supra*, p. 2), commission of the felony denounced by Section 145(b) would have been established.

There is no evidence in this case that defendant "kept no books or records" (the contrary is admitted by the agents) as there was in *Cave v. United States*, 159 F. 2d 464 (C. C. A. 8), certiorari denied, 331 U. S. 847; of an elaborate system of payroll padding, fictitious purchases, suppressed sales, false invoices, altered records as was shown in *United States* v. *Lange*, 161 F. 2d 699 (C. C. A. 7); that defendant "resorted to various ingenious and nefarious schemes or subterfuges" as there was in *Locke* v. *United States*, 166 F. 2d 449 (C. C. A. 5) certiorari denied 334 U. S. 837; that defendant's mode of carrying on his business operations was calculated to conceal their magnitude and prevent investigation thereof as in *United States* v. *Chapman*, 168 F. 2d 997 (C. C. A. 7), certiorari denied, 335 U. S. 853; that defendant kept no books, records, cancelled checks or check stubs and destroyed numerous files as in *Myres* v. *United States*, 174 F. 2d 329 (C. C. A. 8) certiorari denied 338 U. S. 849; or that defendant resorted to an "elaborate scheme to defraud" as in *United States* v. *Rosenblum*, 176 F. 2d 321 (C. C. A. 7) certiorari denied 338 U. S. 893; and *United States* v. *Raub*, 177 F. 2d 312 (C. C. A. 7).

None of the affirmative elements around which the above cases revolved, or any of the examples enumerated in the *Spies* case, *supra*, are present in the instant matter. Petitioner made no "attempt" to conceal any phase or item of

his professional or business activities or to prevent an investigation thereof.

3. That counts 1 to 5, inclusive, of the indictment A1a to A6a) are in violation of the provisions of Article VI of the Amendments to the Constitution of the United States of America (*supra*, p. 3) in that they do not inform petitioner "of the nature and cause of the accusation" contained therein. The indictment is before the Court; petitioner cannot subtract anything from it. The only charge that is specific is that petitioner failed to file returns for the respective years involved, at the most being violations of Section 145 of the Internal Revenue Code (*supra*, p. 2); other portions are based upon conclusions of the framer of the indictment.

Petitioner submits that the first five counts of the indictment herein, do not meet the criteria fixed by this Court, over the years, by which the sufficiency of an indictment is to be judged. *U. S.* v. *Potter*, 56 Fed. 83 reversed on other ground, 155 U. S. 438; *U. S.* v. *Cruikshank*, 92 U. S. 542, 557; *U. S.* v. *Cardiff*, 78 S. Ct. 189.

Petitioner made timely motions for a bill of particulars with the hope that the vagueness of these counts of the indictment might be clarified. That motion was denied, except as to one particular which, when furnished, appeared as vague and uncertain as the indictment itself.

In *Capone* v. *United States*, 56 F. 2d 927, 931, the Court dismissed defendant's point on appeal involving the sufficiency of the indictment because he had not moved for particulars below; admitting, however, that the form of indictment used was indeed quite general and would have abundantly justified the defendant in asking the court to require the district attorney to furnish a bill of particulars as to the specific attempts to evade and defeat, and the court observed that it could not presume that the request

would have been refused, citing *Rosen* v. *U. S.*, 161 U. S. 29. The form used in that case was more specific than that in the present case.

In view of the fact that petitioner did apply for a bill of particulars which was denied, for all intents and purposes, it would seem to follow under the *Capone* case, *supra,* that the indictment herein should be declared insufficient as a matter of law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

J. Richard Kafes, *Pro Se,*
219 West State St.,
Trenton 8, New Jersey.

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,137

UNITED STATES OF AMERICA,

v.

J. RICHARD KAFES,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued June 7, 1954

Before:

BIGGS, *Chief Judge*, and GOODRICH and MCLAUGHLIN, *Circuit Judges*.

OPINION OF THE COURT

(Filed July 13, 1954)

By GOODRICH, *Circuit Judge*.

This is an appeal from a conviction for violation of sections 145(a) and 145(b) of the Internal Revenue Code. The alleged 145(a) violations cover the years 1949 and

1950, while the alleged 145(b) violations cover the calendar years 1946 to 1950, inclusive. The indictment was in seven counts, and the jury returned a verdict of guilty in all. The trial judge sentenced the defendant to imprisonment for one and one-half years on each of counts one to five and for one year on counts six and seven, respectively, but provided that the sentences on all seven counts were to run concurrently.

The defendant has raised numerous points as reasons for reversal of the judgment against him. They will all be noticed but not in the order in which they were presented.

I. Fair Trial.

The first and what seems to us the most serious argument for reversal is that the defendant did not get a fair trial. If this allegation were borne out by the record we should, of course, order a new trial as we have in numerous other cases. Obviously the way to investigate this matter is not on the basis of the quotations here and there from colloquies between judge and counsel over an eight-day trial, but to read the report of the proceedings as the trial went on. When this is done the allegations that the defendant did not get fair treatment are not supported. The defendant, who is a member of the bar, conducted most of his own defense. As would be expected under the circumstances, he endeavored to take advantage of all points which he conceived to be in his favor. There were numerous exchanges of remarks between the court and the defendant whose position on some legal points was quite different from that of the judge. Occasionally the judge reproved defendant, but he also assisted him at times in phrasing a question to bring out a point. He allowed very great freedom in cross-examination of the government's witnesses. The impression from the read-

ing of a long record is that the trial was conducted with fairness and with as few clashes as this type of litigation would be expected to produce. See United States v. Stoehr, 196 F. 2d 276 (C. A. 3), cert, denied, 344 U. S. 826 (1952).

II. The Charge.

Complaint is made also that the judge's instruction to the jury was not a fair one. This complaint is not supported by a reading of the charge. It was full, it was fair. The court endeavored to refresh the memory of the jurors by recounting the testimony of witnesses. The defendant complains that the court emphasized matters unfavorable to him and left out those which were favorable to him. As a matter of fact, the court could have gone much further than it did in commenting on the testimony. It is to be noted that in the course of his instructions the judge told the jury:

> "If, during the trial of the case, it was necessary for the court, in a legal fashion, to rap the knuckles of either one of these gentlemen (counsel), that has absolutely nothing to do with the case in the slightest respect because they were advancing their own particular theory of the case as they, as lawyers, must do. So that has nothing to do with it. By and large, I guess, the best yardstick that I could possibly give you is the oath of office that you took when you started to hear the case that 'you and each of you do solemnly swear that you will well and truly try this issue, and a true verdict render, according to the evidence, so help you God.' "

We are completely satisfied that there is no ground for reversal either in the general conduct of the trial or in the instructions to the jury.

Appendix A

III. Illness of a Juror.

The defendant urges that there should be a reversal because one of the jurors became ill during the jury's deliberations and therefore he had a verdict by eleven instead of twelve jurors. What happened was this. After the jury had been out for some time and had received additional instructions on one point, a request came that some Alka Seltzer be secured for one of the jurors. This was agreed to by counsel and the article was sent to the jury room. Subsequent to the trial the defendant offered statements from two of the jurors to the effect that the forewoman was affected by indigestion during the time the jury was out and that she did not take part in the deliberations for a portion of the time. On the other hand, we have a memorandum from the trial judge that he interviewed the juror in question, who declared that she was not incapacitated.

We think a jury system cannot be made to work if, after trials, verdicts may be attacked by such affidavits from jurors. Suppose it is to be shown that one juror took a nap, or that another refused to participate in the general discussion of the case at hand, or that another used bad language and thus intimidated more timid members of the jury. There is no limit to the number of attacks on a verdict which could be made if this kind of thing were permitted. Jurors are selected with care; they take an oath to perform their duty; and their verdict is not to be impeached by affidavits of this type. Parsons v. United States, 188 F. 2d 878 (C. S. 5, 1951); United States v. Furlong, 194 F. 2d 1 (C. A. 7), cert. denied, 343 U. S. 950 (1952). See also United States ex rel. Daverse v. Hohn, 198 F. 2d 934 (C. A. 3, 1952) cert, denied, 344 U. S. 913 (1953); United States ex rel. Darcy v. Handy, 203 F. 2d 407 (C. A. 3), cert. denied, 346 U. S. 865 (1953).

Appendix A

IV. Bill of Particulars.

Prior to the trial the defendant asked for a bill or particulars. This motion was heard by Chief Judge Forman, who denied it except as to one request, which was:

> "4. Set forth with particularity what records it is contended the defendant avoided making that he should have made in the usual course of transactions in which he participated."

This the government answered as follows:

> "4. The Government contends that, under Bureau of Internal Revenue Regulations 29.54-1, 26 CFR, Part 29.54-1 adopted pursuant to Title 26, United States Code, 54(a), the defendant was under a duty, for the purpose of enabling the Commissioner of Internal Revenue to determine the correct amount of his income subject to income tax, to keep such permanent books of account or records as would be sufficient to establish the amount of his gross income and the deductions, credits, and other matters to be shown in his return; to keep such books and records at all times available for inspection by Internal Revenue officers, and to retain them so long as the contents thereof might become material in the administration of the Internal Revenue law.
>
> "Other than the foregoing, no particular forms of records are specified in the statutes or regulations.
>
> "The Government contends that the defendant avoided making and keeping records of his income which would meet the foregoing requirements."

The granting of a bill of particulars is a matter for the trial court's discretion. See United States v. Caserta,

199 F. 2d 905, 910 (C. A. 3, 1952). We think that discretion was not abused here. It is significant, we think, that the defendant did not during the trial claim surprise and ask a continuance. Nor does he now show us how he was hurt by the lack of a bill of particulars.

V. Postponement of the Trial.

The same rule about exercise of discretion applies to the complaint that defendant was not given a postponement of his trial. He had had one continuance. He asked for another. This was denied. We do not think there was any abuse of discretion in this respect either.

VI. The Statute of Limitations.

Complaint is made of the trial court's refusal to dismiss count one because it was barred by the statute of limitations. Count one has to do with the attempt to "defeat and evade" for the year 1946. The indictment was returned February 24, 1953. The period of limitation is six years. 26 U. S. C. A. 3748(a)(2). The government answers, however, that the alleged offense concerning the 1946 tax did not become complete until March 15, 1947. This was the day when payment became due, it says, and, therefore, the statute did not start to run with regard to the year 1946 until the March 15th following. We agree. We think that this is a complete answer.

VII. Election Between the Evasion Counts and Wrongful Failure to File Counts.

The defendant endeavored to compel the prosecution to elect between counts four and five, which were for the willful attempt to evade under section 145(b), and counts six and seven, which charged willful failure to file returns for the same two years, under section 145(a). The argu-

ment is that the provision against double jeopardy makes it unconstitutional to make the misdemeanor of failing to file one of the circumstances to be considered in determining whether there has been any attempt to evade the tax, a felony.

Sections 145(a) and (b) define separate offenses. Since Spies v. United States, 317 U. S. 492 (1943), it has been clear that a showing of a failure to file plus other affirmative acts is sufficient to sustain a conviction under section 145(b), but that a willful failure to file alone is not sufficient. See United States v. Smith, 206 F. 2d 905 (C. A. 3, 1953). In the present case, the trial court correctly charged that there was evidence of acts of commission which could supply the needed quantum: for example, defendant's avoidance of making proper books of account and records; his failure to enter some items in the duplicate receipt books that he did finally begin to keep; and the cashing of checks without clearance through his bank account. See Spies v. United States, supra, at 499.

Nevertheless, the question remains whether, since the section 145(a) violation was used to prove in part the section 145(b) violation, defendant could be convicted for the misdemeanor. The governing rule has been reiterated recently by the Supreme Court in Pereira v. United States, 347 U. S. 1, 9 (1954): "• • • (Defendant may be convicted of (two separate offenses) even though the charges arise from a single act or series of acts, so long as each requires the proof of a fact not essential to the other." It is not necessary to prove a failure to file to convict for an attempt to evade; for example, section 145(b) may be violated by the filing of a false return. See United States v. Croessant, 178 F. 2d 96 (C. A. 3, 1949), cert. denied, 339 U. S. 927 (1950). Conversely, it is not necessary to show the acts of commission required by the Spies case to prove a willful failure to file a return. For further differences,

see O'Brien v. United States, 51 F. 2d 193 (C. A. 7), cert. denied, 284 U. S. 673 (1931). Defendant argues that, even though failure to file a return need not be shown to prove an attempt to evade, the double jeopardy provision is applicable when that failure is in fact used. The short answer to this contention is that the rule itself, as quoted above, sanctions the use of one act as part of the proof of both offenses.

VIII. The Evidence Supports the Verdict.

The defendant argues that as to the attempt to evade counts the evidence is insufficient to support the verdict. He does not urge this so much with regard to the wrongful failure to file returns. Indeed, there is evidence of an admission that he did not file returns because he did not have the money to pay his taxes, an excuse which, if valid, would undoubtedly be called upon by a great many of us. The case was thoroughly tried. The defendant showed the nature of his relations with persons who had paid him money and got into the record that the payments were "in ordinary course of business." The government investigators were thoroughly cross-examined. Defendant had failed to keep sufficient records to allow an audit of his receipts and expenditures in the ordinary way. The extent of his income had to be proved by showing how much he had taken in. This was a difficult task since defendant had kept money for clients, his own fees, and receipts from capital transactions without separating them in bank accounts. Defendant had before the jury his willingness to co-operate with the government investigators and got them on record in saying that he had done so. But, on the whole, the question whether he was attempting to evade his obligation to the United States was a jury question and the jurors decided against him. We cannot say that their conclusion was wrong.

Appendix A

This is a very hard case for the defendant because a conviction of crime of a member of the bar carries with it disastrous consequences, which might not be equally hard on one following some other means of activity for a livelihood. But the defendant had a fair trial, of that we are sure. We have considered all his points on appeal and do not think that there is such merit in any one of them or all of them together as to merit a reversal.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

CLERK OF THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,137

UNITED STATES OF AMERICA,

vs.

J. RICHARD KAFES,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present:

BIGGS, *Chief Judge*, and GOODRICH and MCLAUGHLIN, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

HARRIET G. HUMPHREYS,
Deputy Clerk.

July 13, 1954.

Appendix C

The following are representative excerpts from the record, of comments, statements and remarks of the trial judge:

At the outset of the trial the following occurred:

> "The Court: If that is your only ground for objection, your objection is overruled, and you may have an exception.
>
> Mr. Kafes: I asked, sir—
>
> The Court: No, no, don't get confidential with me. If you are going to say anything, say it so everybody can hear it."

The district attorney and counsel for defendant entered into a stipulation, at the suggestion of the district attorney, as to the admission of two checks admittedly received by defendant, so that a Government witness might be excused. At the opening of Court the following morning, the following colloquy occurred in the presence of the jury (D47a-D50a):

> "Mr. Rounds: Very good. If the Court please, at this time, I have two checks bearing date respectively October 23rd, 1947 in the amount of $750 payable to the order of J. Richard Kafes numbered 2168 on the account of Crawford Brothers, Incorporated, Walton, New York, and No. 2616, same account, bearing date December 15, 1947, payable to the order of J. Richard Kafes in the amount of $2500. The Government is prepared to stipulate, and, I believe, the defendant will also stipulate that these checks were received by the defendant in payment for professional services rendered on invoices delivered to the defendant—I mean delivered to Crawford Brothers, Inc., at Walton, New York by the defendant, and were received by the de-

fendant and deposited in the defendant's bank account in the Broad Street National Bank in Trenton, in the due course of business.

Mr. Kahn: If it please your Honor, we consent to those two checks being admitted into evidence on the basis of the stipulation set forth by the district attorney. I would like to point out that the district attorney and I have agreed to a statement that these checks and the payments thereof was in the regular course of practice of the defendant's profession; that there was no effort at concealment; that there was no effort at so handling this as not to be in the regular course of business, and that they are endorsed on the back.

The Court: This is not the proper time to make your closing argument to the jury.

Mr. Kahn: That was the stipulation, your Honor.

The Court: Is that your stipulation?

Mr. Rounds: Your Honor, I think that my remarks contain the sum total of the stipulation. Now, I propose that the checks be received in evidence on that basis, and any further conclusions can't be drawn from them.

The Court: Are you prepared to prove them?

Mr. Rounds: I excused the witness who produced these checks, your Honor.

The Court: You heard the district attorney's stipulation. Are you willing to agree to it or not?

Mr. Kahn: After court yesterday, your Honor—

The Court: No, no, I asked you a very simple question, Mr. Kahn.

Mr. Kahn: You mean completely eliminate my statement, your Honor?

The Court: Completely eliminate your argument to the jury, yes.

Mr. Kahn: If it please your Honor, I am prepared to admit this. I would like to point out that I have made no argument to the jury. I merely related what I said to Mr. Rounds yesterday.

The Court: It is your opinion that you made no argument to the jury. That is just like a lot of things connected with human events. There is a variation of opinion, and my opinion is different.

Mr. Kahn: Your Honor wasn't here when we made the statement.

The Court: I was here when you started your statement to the Court. I know not what you and Mr. Rounds agreed to. I asked you a very simple question and I expected a very simple and direct answer, either yes or no. Do you agree to the stipulation as stated by Mr. Rounds, yes or no?

Mr. Kahn: I do, but I desire to state that my statements were statements that I made yesterday in the presence of Mr. Rounds, and as Mr. Rounds said we were working it out to present it to the jury yesterday, and I don't believe Mr. Rounds would object to that.

The Court: I didn't hear any objection coming from Mr. Rounds. The Court objected because the remarks were improper. They were not statements of fact; they were arguments to the jury. I didn't hear any objection from Mr. Rounds.

Mr. Kahn: If it please your Honor, there were a number of stipulations that these would be introduced. Then, this would not be an argument but a statement of fact.

The Court: Oh, no. The Court will rule upon what is not a statement of fact.

Mr. Kafes: May it please your Honor, I would now like to make a motion outside of the hearing of the jury, sir."

And at page D52a:

> The Court: All right, ladies and gentlemen of the jury, you may step out for a recess.
>
> Mr. Kahn: Before they do, your Honor, might I make one additional remark. I want to be sure in view of our last discussion, that these two checks it was agreed were deposited in the regular course of business in the Broad Street National Bank, and cleared the Broad Street National Bank in the regular course of business. I think that was understood, but I just wanted to make sure it was.
>
> Mr. Rounds: That was our understanding of the stipulation, your Honor.
>
> The Court: All right. Now, you may step out, ladies and gentlemen, for a short recess."

And at pages D61a-D62a:

> Mr. Rounds: If your Honor please, I would like to propose to stipulate now that Mr. Schwarz's testimony would be to the effect that during the—
>
> The Court: Just a minute, please. You see it is very dangerous for you to propose something and you state it in the presence of the jury, and they hear it. If, then, the defendant does not agree to it, it could become very argumentative and *highly prejudicial.* I would suggest, gentlemen, that you have these understandings regarding stipulation, and have them out of the presence of the jury. You may step out, ladies and gentlemen of the jury."

At page D59a:

> "Mr. Kafes: May it please your Honor, again, I say, this is a matter that I offered to, and I will stipulate on the record.

The Court: Well, Mr. Kafes, that is all very fine, but the United States Attorney is entitled to try his case as he wants to. I can't try his case for him, and I can't try your case for you. You said that a number of times, and I do not think the repetition is necessary."

Mr. Donald W. Hornbeck, a Government witness, testified that he was a member of the bar of the State of Ohio. At the conclusion of cross-examination, the following occurred (D141a-D142a):

"Mr. Kafes: Mr. Hornbeck, may I ask you one further question: Do you know from your experience that checks should have bank stamps on the back of them?

The Witness: That is correct.

Mr. Kafes: And you can read 'Broad Street National Bank' if you see it in plain English, can you not?

The Witness: Yes.

Mr. Kafes: That is all.

The Court: You can read and write, in other words?

The Witness: I sometimes wonder.

Mr. Kafes: I ask your Honor on your own motion to strike that remark from the record.

The Court: No. I think it is proper inquiry.

Mr. Kafes: I ask an exception.

The Court: You may have it.

Mr. Kafes: I do not think that it is proper.

The Court: That is all right. That is a variation of opinion that exists throughout the world.

Mr. Kafes: I hate to think that your Honor would suggest that a member of the Bar of the State of Ohio may not be able to read or write. I

would hate to have someone suggest that as to you, or to me.

The Court: I just wanted to make that conclusive as to whether Mr. Hornbeck could read and write."

During defendant's cross-examination of a Government witness, the following occurred (D177a):

"Q. Well, don't you know whether or not it was the same person?

Mr. Rounds: I object.

The Court: Mr. Kafes, he has answered that twice. I think that is sufficient.

Mr. Kafes: Judge, your Honor, he hasn't answered it.

The Court: Possibly not to your satisfaction."

During cross-examination of Mr. Thompson, an Intelligence Officer of the Revenue Department, called by the Government, the following occurred (D194a):

"Q. When did you get the information from Berg Hedstrom, and through what medium? A. They sent a letter to Mr. Heller.

Q. Will you ask Mr. Heller to hand you the letter?

The Court: No, not that, and don't do that. That is not proper.

Mr. Kafes: He has testified to the contents of the letter.

The Court: No, he didn't.

Mr. Kafes: He said we found it out by letter.

The Court: He said, Mr. Kafes, that we made inquiry, and you said how did you make the inquiry and he said that they sent him a letter.

Q. Mr. Thompson, what was contained in that letter that you have? A. Your only fee was $750.

Q. I notice that you look over there. Do you have some hope that the letter might be in your file?

The Court: No, no, no. That is not proper. That will be stricken. We are not concerned with his hopes."

During the examination of Mr. Heller, a Government witness, the following transpired (D242a):

Mr. Kafes: May it please your Honor, may I suggest to your Honor that if they were for services—

The Court: When you want to testify, you may."

At pages D255a-D256a:

"Q. Did you make any allowance to me for any other expenses except the railroad? You see in the first instance on the Washington trip, you allowed me the hotel and not the rail—

The Court: Now, don't argue with the witness. You asked him a question. Let him answer it.

Mr. Kafes: I ask an exception.

The Court: For what?

Mr. Kafes: To your Honor's remark.

The Court: Well, nevertheless, obey them.

Mr. Kafes: I didn't hear you.

The Court: Well, nevertheless, even though you pray an exception, obey them."

At page D259a:

"The Court: You can ask him questions as to what he allowed or did not allow. The proper time

for your pointing out whether it is fair or unfair is in your argument to the jury which is not conducted in the middle of your examination or cross-examination."

At page D274a:

"Q. I find then that on June 11th and 12th, 1946 I was in Washington, D. C., and registered at the Roosevelt Hotel. A. That is correct, sir.

"Q. And I had—that on that trip Mr. Dick Connally was with me, a lawyer.

The Court: Mr. Kafes, I don't like to interrupt constantly but you know much better. Now, there is a great deal of difference between asking a question and making a statement. Now, Mr. Reporter, just read the question to the point where I interrupted.

(Question repeated as follows:

'Q. And I had—that on that trip Mr. Dick Connally was with me, a lawyer—')

Mr. Kafes: May I, may it please your Honor, suggest that it is technical.

The Court: Technical nothing, Mr. Kafes. It is not correct, period. Proceed."

At page D286a:

"Q. Well, if you allowed me anything for Banff Springs I ask you now to take it out of there.

The Court: That is an improper question. Proceed with your examination.

Mr. Kafes: Yes, if it please your Honor, but just as much as I want to be credited with proper things, I don't want to be credited with something that isn't proper, and I am saying to the Govern-

ment, the trip from Chicago to Banff turns out not to be a business trip.

The Court: Well, that is very fine, Mr. Kafes, if you want to stop this cross-examination and assume the stand, and I will allow you to do at the proper time, whenever you desire, but at the present time you have this witness under cross-examination, and the method of cross-examination is to put a question to the witness and elicit answers, and not for you to stand there and make statements. That is what I was attempting to point out to you.

Mr. Kafes: May it please your Honor, I think it is fundamental on cross-examination to ask the witness why did you do this or why didn't you do it. That is the first purpose of cross-examination as your Honor well knows.

The Court: Unfortunately, we disagree on that particular point.

Mr. Kafes: We disagree on that?

The Court: There is another thing, Mr. Kafes, we apparently disagree upon, and it is your refusal to wait until I finish.

Mr. Kafes: I am terribly sorry, if your Honor please. I had not intended to interrupt you and I have not meant, and I ask your forgiveness."

At page D291a:

"The Court: Objection sustained.

Mr. Kafes: I didn't hear any objection.

The Court: I did previous to this line of examination.

Mr. Kafes: May I ask who made the instant objection, sir?

The Court: Mr. Rounds, and if he didn't, it is improper.

Mr. Kafes: I would like the record to indicate whether this is a motion by your Honor or one by Mr. Rounds, and what it really is based upon.

The Court: Well, if Mr. Rounds didn't make one, I did. It is argumentative; it is not in proper form.

Mr. Kafes: I respectfully suggest to your Honor that the very first principle, the fundamental rule is that cross-examination is for the purpose of asking a witness why did you say this and why did you do that, and why didn't you do this or why didn't you do that, and in this respect I am asking this witness, who is a government witness, why in good conscience he is going to allow me $4.06 for a hotel in Chicago and not allow me anything to get to Chicago, and I insist to your Honor that this is proper and fundamental cross-examination.

The Court: Well, unfortunately, Mr. Kafes, your understanding doesn't make it necessarily so. The objection is sustained. You will be allowed an exception."

At page D350a:

"The Court: Unfortunately, Mr. Kafes, you and I disagree many times on what the law says and what it does not say, and when there is a disagreement, we ultimately must accept, at least temporarily, my conclusion as to the law."

At pages D351a-D353a:

"Mr. Kafes: May it please your Honor, would it not be proper that I be offered the paper from which the witness is testifying? Is that not a fundamental right of practice?

Appendix C

The Court: Mr. Kafes, if you will allow me, without the violation of any of your rights or the surrender of any of your right, I will conduct this in my own way.

Mr. Kafes: May it please your Honor, that is difficult. I do not propose to sit by and let you conduct it in your own way without making my objection.

The Court: That is quite obvious that you do object.

Mr. Kafes: I ask this, that your Honor direct the witness to let me look at the paper from which he is testifying.

The Court: When the witness finds it and tells me whether it verifies here what he has previously told us, I will make it available to both of you gentlemen. Have you done it yet?

The Witness: I haven't completed the computation yet.

The Court: At the finish of my examination, you will make that sheet available to both these gentlemen.

Mr. Kafes: I would like to do it at the usual time. I would like to see what he purports to be submitting is a correct item.

The Court: You may have it at the close of the examination.

Mr. Kafes: May it please your Honor—

The Court: The next item, I take it, is—

Mr. Kafes: May it please your Honor, I ask you to hear me now.

The Court: Mr. Kafes, I am going to hear you, but I am not going to have you, by your own action, prevent my conducting this examination.

Mr. Kafes: I think your Honor will admit that I have a right to be heard at any stage when I think I am within my rights. Your Honor can rule against me, but I think I have a right to object, if it please your Honor, at any point, do I not? I would like to be heard as to something.

Mr. Kafes: I, if it please your Honor, respectfully submit to you that no examining person such as a district attorney, or prosecutor, or otherwise, under any circumstances, would hand a piece of paper to a witness and ask him to testify from the paper without first handing it up to the other side. I haven't used one thing with the witness that I haven't submitted to Mr. Rounds before I used it, and there is good reason for that; the law recognizes the reason for that. Mr. Heller said to you, and my guess is absolutely true, that he has in his hand the statement that I prepared. I have a right to see that before he testifies from it. Your Honor will certainly recognize that that is the way things are done ordinarily. You don't hear testimony from someone and then say, 'I will let you look at it later'—let us assume that by one chance in the world when you show him that paper that I later will be able to show that that wasn't a statement furnished by me. In the meantime, everything that a witness might take from the paper is in the record and before the jury. So, I object to the further use of the paper by the witness until I have had an opportunity to look at it, the same opportunity that I have afforded to the District Attorney in the case of every paper I used. I think Mr. Rounds will admit that.

The Court: Are you finished?

Mr. Kafes: Yes, sir.

The Court: Mr. Heller, the next item—

Mr. Kafes: May I have a ruling on my motion?
The Court: Your motion is overruled."

At page D357a:

"Mr. Kafes: May it please your Honor, may I ask whether your Honor's examination is in the nature of direct or cross-examination?

The Court: It is the Court's examination, Mr. Kafes. It is neither direct nor cross. Now, Mr. Heller—

Mr. Kafes: May it please your Honor, might I suggest to your Honor that a court and a judge such as yourself is as completely bound by the rules of evidence as the district attorney or as am I. The mere fact that a question came from a court does not make an improper question proper or a proper question improper.

The Court: That is one of the *few* times, Mr. Kafes, that you and I agree on a point of law.

Mr. Kafes: I ask an exception to your Honor's last remark.

The Court: You have it. What is improper about the question.

Mr. Kafes: I want to know whether, first your Honor is engaging in redirect examination or whether you are engaging in cross-examination because there are entirely separate and distinct rules applying one to the one and the other to the other.

The Court: This is the Court's examination, Mr. Kafes."

At pages D358a-D359a:

"Mr. Kafes: May it please your Honor, firstly, as a point of law, your Honor has suggested that a

property owned by a husband and wife that there is a divisable interest, and I say that that is fundamental that there is no divisable interest in property held by a husband and wife in that relationship.

The Court: I haven't suggested anything of the sort.

Mr. Kafes: You have, excuse me.

The Court: I haven't suggested anything of the sort in the least degree. I know just as well as you do that there is no divisible interest in an estate in entireties held by a husband and wife, but I do know that when property is sold or converted to personalty, the estate then changes, and I am asking this in view of that statement are his calculations correct.

Mr. Kafes: May I ask the reporter to read back with your Honor's permission that question and answer? And if you did not say that, I will sit down and say nothing further.

The Court: I do not insist upon that. You may do whatever you want.

Mr. Kafes: I would like your Honor to ask the reporter to do that in view of the fact that you deny you say what I said you said.

The Court: We will have it if you will be quiet. He can't read it to us and write what you say at the same time, now."

At page D367a:

"Mr. Kafes: We have been into direct, we have been into cross-examination, and we have been into your Honor's questions.

The Court: Yes. Let us not get into an argument about it.

Mr. Kafes: I would like to know because the rules are different, as your Honor knows.

The Court: I will cross that bridge when I get there, not before."

At page D371a:

"Q. Do you remember the case of the State of New Jersey check for $2550 where Mr. Steen, of the bank, recognized a deposit slip for $1,000 deposit that was part of $2550 check?

Mr. Rounds: I object. I think that is argumentative.

The Court: Yes, that is right. That is not proper, and I will sustain the objection.

Q. Mr. Heller, do you recall that Mr. Steen did recognize the fact that a $1,000 cash deposit on January 10th, 1950, was a portion of the proceeds of my cashing a $2550 State of New Jersey check? Do you remember him saying that?

Mr. Rounds: Same objection, your Honor.

Mr. Kafes: May it please your Honor, I merely asked the witness whether he recalled it. I don't mean to argue with him.

The Court: It is immaterial whether he recalls it or not. So, I will sustain the objection and I will allow you an exception.

Mr. Kafes: May it please your Honor, I am not going to unduly urge this, but it was just preliminary to another question. I asked him whether he recalled. I am not arguing with him at all.

The Court: Yes, I understand, I understand your purpose, but it is improper, in my estimation, and I will sustain the objection."

Appendix D

Excerpts from the record as to Petitioner's Point 3.

MR. RICHARD G. HELLER, the Internal Revenue Agent in charge of this matter, testified as follows:

At page D240a in speaking of defendant's income for the year 1947:

"*By Mr. Rounds*:

Q. Do you know of any business income not deposited? A. No."

At page D242a:

"Q. Now, did Mr. Kafes have any records other that his checkbook to show what his business expenses were during 1946 and 1947? A. Well he would refer to a lawyer's diary at times, and again to the case jacket, case folders or files that he had, and then he had for a few receipts in pencil, and they were in the files."

At page D248a:

"The Court: But first of all, was there any gross business income not deposited?

The Witness: None determined, sir."

On cross-examination at page D251a:

"*By Mr. Kafes*:

Q. And then, we had a series of days together, and wonder if, at the outset, you might say whether or not I cooperated with you in every degree or whether I didn't? A. Yes, sir, you did.

Q. And I gave you, for instance, my bank statements for 1946, and there was no other source from

which you could have gotten them, is that not true, sir? A. Well—

Q. The checks alone, I mean. Let him see the checks. A. Oh, yes, sir."

At page D313a:

"Q. Do you remember, Mr. Heller, when you visited me the *first* time you asked me, among other things, in what bank I had maintained accounts during those three years? A. That is right.

Q. Five years. You remember what my answer was to you that day? For the purpose of refreshing your memory, I show you Exhibit No. G-3 in evidence. A. The Broad Street Bank in Trenton, the First National Bank of Spring Lake, and the Manufacturers Trust Company.

Q. New York. A. Yes. (The account allegedly employed by defendant to conceal income.)

Q. I may not on the first visit, but did I not subsequently tell you about that account and show you that within a week after the deposit was made a check was forwarded by me to the Collector of Internal Revenue for $6600 or $6700? A. I believe so, I believe you had, sir."

At pages D337a-D338a:

"Q. In other words, everything that I told you the other agents wanted to verify to see, if, possibly, I had made some untruthful disclosure to you, or that I failed to disclose something to you? A. Well, that would be—

Q. Isn't that a fair thing to say? A. Yes, sir.

Q. Now, I ask you directly, Mr. Heller, whether or not in your 113 days you found anything that I

said to you to be not true in the slightest degree? A. Well, I know of no particular instance other than room for human error, but nothing untrue.

Q. Mr. Heller, on behalf of the Government you have attended every session of the trial, have you not? A. Yes.

Q. Now, the Government brought various witnesses here for the purpose of proving income from various clients; you saw them, didn't you? A. That is correct.

Q. They came in one after the other. Now, you remember that they called Mrs. Bonom from Jackson, Mississippi to come up here and prove, as she suggests, that I received $10,500 per years with the exception of a slight deduction in 1950 or 1949, I think it was. A. That is correct.

Q. For services and expenses? A. That is correct.

Q. Did I tell you, sir, that I received $10,500 a year from Aponaugh? A. You did, sir.

Q. I am not taking them in order, but I will take every one. There is a representative from Ellison & Spring? A. Yes.

Q. Did I disclose to you that I represented Ellison and Spring?"

In an effort to summarize the testimony of Mr. Heller, the last question asked of him by defendant upon cross-examination was (D340a):

"Q. Now, Mr. Heller, I ask you whether or not you in your 113 days and the other agents with as much time as they spent, whether you were able to uncover, if I may use that word, or find one penny of income that I had which I did not report to you

and which, except in the case of the $225 did not get into my bank account? A. I don't recall any item of that type, sir."

Again, upon the conclusion of cross-examination, the Court examined the witness to the extent that the same covers 32 pages of the original transcript of the record, the following being some of the questions and answers (D341a-D342a):

"The Court: Now, let me ask you prior to your first conversation with Mr. Kafes regarding his account and his income, and disbursements, had you done any preliminary work?

The Witness: Well, I had requested a search of the Camden office for the record and I believe I had contacted or made a trip or two to Mr. Kafes' office. He wasn't there sometimes. Then, I began my investigations at the bank, until such time as I could make contact with Mr. Kafes.

The Court: And your investigation at the bank consisted of what?

The Witness: Well, I first went there to go over his loan account, over his bank account.

The Court: By 'going over his bank account' you mean by the microfilm system?

The Witness: No, sir. At that time the ledgers were available. I was concerned mostly with his loans at that period.

The Court: How much information would you say you had at the time you had your first conversation with Mr. Kafes regarding his income and disbursements?

The Witness: Well, it was limited at that time to property owned by Mr. Kafes and the loans granted by the bank."

Appendix D

Over the objection of the defendant, the Court asked the following questions (D342a):

> "The Court: Now, let me ask you this, Mr. Heller. Would you say that Mr. Kafes had adequate books showing his income and disbursements from his business so that you could determine his income and disbursements without any other examination, or without any inquiry from him?"

(D343a-D344a):

> "The Witness: Well, without Mr. Kafes' aid, we could not determine the things we have determined, I mean as we have determined them now. An exhaustive search, probably of his files may have uncovered the information, but I could not say because Mr. Kafes would request, requisition his file at various times to refresh his and our memory."

The District Attorney then began redirect examination of the witness and asked the following (D364a-D365a):

> "*By Mr. Rounds*:
>
> Q. Mr. Heller, on cross-examination you testified that Mr. Kafes gave you the information with regard to these numerous persons who came in and testified that they had paid a fee or income of other nature, tell us, please, was Mr. Kafes in each case the source of the information? For instance, with regard to the income from the Berg-Hedstrom Company, was he the source of the information?
>
> The Court: I think that question is somewhat unclear. What do you mean by 'source'?
>
> Mr. Rounds: Was he the original source of information.

The Court: I think you should include that in your question.

The Witness: I could not recall, sir. I could not make a definite statement."

That on further cross-examination, the following questions and answers were recorded at page D378a:

"*By Mr. Kafes*:

Q. Well, you made the inquiry for the purpose of determining income, and I suppose that was to check what cases I had appeared in? A. That was the ultimate end.

Q. As a result of all that, did you find an income? A. No, sir."

Mr. Levere A. Thompson, Special Agent Intelligence Division, Bureau of Internal Revenue, testified as follows:

On page D171a:

"*By Mr. Kafes*:

Q. Now, Mr. Thompson, do you not consider a person's bank deposits, his bank book stubs, and deposit slips a part of a person's legitimate records? A. I do.

Q. I had them from 1946 until 1950, did I not? A. I didn't see any deposit slips, I do not believe, at your office.

Q. Well, you did see my checks? A. Yes, sir.

Q. Cancelled checks? A. Yes, sir.

Q. You saw my bank stubs? A. That is right.

Q. Now, I ask you, Mr. Thompson, would it have have my cancelled checks or my bank book stubs for been possible for you under any circumstances to

1946 or a portion of 1947 unless I voluntarily handed them to you? I mean, you will agree— A. I could not have them unless you gave them to me."

At page D181a:

"Q. Now, you had information, did you not, as to what had transpired between Mr. Heller and me by way of disclosure of records, and so on? A. I was familiar with what records you had. He had not told me what records you had before I got there.

Q. Now, I ask you whether or not, Mr. Thompson, whether it was ever contemplated by you or whether you ever suggested to me 'Now that I have come in, let us start all over. Tell me everything you have already told Mr. Heller.' A. I never suggested anything like that.

Q. Now, that is correct. So that when you say that I did not disclose the Kucharski fee to you that under no circumstances, forecloses the suggestion that I already disclosed it to Mr. Heller, does not? A. It does not."

At page D184a:

"Q. Now, you were asked by Mr. Rounds what records I have? A. Yes.

Q. You said that I had cancelled checks? A. That is right.

Q. I had bank statements, and I also had diaries in the office in which fees were recorded. You meant to say that, didn't you? A. That is right.

Q. And I had case files on which fees were recorded? A. That is right.

Q. And in addition to that, I had my bank stubs, did I not? A. That is right.

Q. Now, I ask you whether or not a person's bank account, deposit slips, cancelled checks, stubs, diary entries, and other notations do not constitute a fairly complete set of records? A. Fairly complete if they are complete .

Q. Did you find any evidence under any circumstances or from any source that the records which I did have weren't complete? A. I would say that I found a couple of items, at least one that would not show up on your records."

At page D186a:

"Q. Mr. Thompson, do you suggest that the Imperial China Decorators' fees were not in my records, is that correct? A. I didn't suggest it. I said I didn't see anything in your records.

Q. I ask you to look and to check what happened with the Imperial China check of June 6, 1949, three and a half years before you came in. A. I would say that was deposited in your bank account."

At page D187a:

"Q. Now, Mr. Thompson, the fact that I deposited two Imperial checks into my account that would make them part of my records, wouldn't it? A. The record of the deposit is shown in your bank statement, yes, sir.

Q. Well, that gives you a very definite method, does it not, of determining my income. You have the bank-deposit method that you are using here? A. Yes.

Q. Now, Mr. Thompson, you did say that I made all my records available to you, did you not? A. You said you showed us everything you had.

Q. Well, I mean—must I be this specific? I gave you my cancelled checks, did I not, sir? A. Yes.

Q. I gave you my bank statements? A. Yes.

Q. I gave you my bank book stubs? A. Yes.

Q. I gave you lawyer's diaries, did I not? A. Yes, sir.

Q. I gave you a receipt book which you copied from? A. That is right.

Q. I had the files made available to you, did I not? A. Certain files.

Q. That were pertinent? A. That is right.

Q. As a matter of fact, Mr. Thompson, is it not true that when you and Mr. Heller were in my office from time to time that on my desk would be all these things? A. That is correct."

At page D190a:

"Q. All right. As to any of these amounts which, you say, I didn't give you as to those amounts were witnesses called to prove them? A. I would say yes.

Q. You have been here in every session, haven't you? A. Yes.

Q. You have seen the witnesses come in? A. Yes.

Q. Did you hear Mr. Heller say that I disclosed the amounts in every instance to him? A. I don't know about—I mean in every instance.

Q. Did you hear Mr. Heller state that? A. I don't recall that is exactly what he said.

Q. Mr. Thompson, it was represented to me, was it not, that you and Mr. Heller were working this case together? A. That is right, sir.

Q. And I was led to believe that what I said to either of you covered both of you, was I not? A. That is correct.

Q. So, then, you could not complain, in fairness, if I didn't tell you something which I had already told Mr. Heller, isn't that true? A. That is correct."

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No. 386

IN THE

United States Court of Appeals

For the Third Circuit

No. 11,137

UNITED STATES OF AMERICA,
Appellee,

vs.

J. RICHARD KAFES,
Appellant.

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

PETITION FOR REHEARING BY APPELLANT

KAHN AND SCHILDKRAUT,
143 East State Street,
Trenton 8, N. J.,
Attorneys for Appellant.

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J. RICHARD KAFES, *Pro Se,*
219 West State Street,
Trenton 8, N. J.

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PETITION FOR REHEARING BY APPELLANT

To the Honorable Judges of the United States Court of Appeals, for the Third Circuit:

The petition of J. Richard Kafes, the defendant in the above entitled cause, for rehearing, made in accordance with Rule 33 of the Court, respectfully shows:

1. That on July 13, 1954, the opinion of the Court, affirming the judgment of the District Court, was duly filed.

2. That said petition is based upon the following reasons as they respectively relate to the opinion of this Court:

I. Fair Trial and II. The Charge

Defendant respectfully urges that further consideration be given to the practical effect of the abundant record of the prejudicial statements made by the Court, [redacted], his pointed remarks, the unjustified reprimands of defendant and his counsel, and the willingness of the Court, at every turn to raise issues between the Court and defendant, personally, and as to his knowledge of the law and the rules of evidence. The atmosphere that was created can be imagined by a review of the transcript of each separate session of Court. The Court below differed with defendant on practically every question that arose as to the admissibility of evidence; to the application of the law to factual testimony, and as to the issues involved in the trial. Time and again, he charged defendant and his counsel in the presence of the jury, with knowingly acting improperly. He reminded defendant that he rarely agreed with him. After listening for eight days, to the many personal matters raised by the Court, between himself and defendant, the jury undoubtedly felt that they were trying that issue. The trial descended to a question of whether the Judge or defendant was right on the many differences the Court called to their attention, and the jury was put in a position of deciding, not the real issues raised by the indictment and plea, but between the judge and defendant as a lawyer.

It is respectfully urged that a review of the record will disclose that the Court was in error on practically every point.

The understandable timidity of a juror to disagree with a trial judge because of the stature of his position and the pedestal upon which he is placed, in their eye, precludes the conclusion that defendant had a fair trial. The judge's word is literally law to the jurors, and his constant erroneous suggestions that defendant was acting improperly as a lawyer, of necessity, would have created a lasting, prejudicial impression against defendant as to the charges contained in the indictment.

Defendant respectfully submits that the portions of the record cited in his brief do not cover, even to a slight degree, the full picture as it unfolded during the trial, but do demonstrate the extent to which prejudicial statements and errors were sprinkled throughout the trial.

The quotation from the Court's charge set out on page 3 of the Opinion could not possibly have erased from the juror's minds the prejudicial impressions so thoroughly embossed thereon during the long trial.

Every admonition to trial judges as to impartiality, prejudice, hostility to a defendant, and solicitude for the essential rights of an accused, laid down by the Supreme Court, were disregarded or erroneously construed by the Court below, in the present instance. *Berger* v. *United States*, 295 U. S. 78; *Quercia* v. *United States*, 289 U. S. 466; *Starr* v. *United States*, 153 U. S. 841; *Hicks* v. *United States*, 150 U. S. 442; *Glasser* v. *United States*, 315 U. S. 60; *Johnson* v. *Zerbst*, 304 U. S. 458; *Patton* v. *United States*, 281 U. S. 276.

III. Illness of a Juror

This Court stated in its Opinion, on page 4, "On the other hand we have a memorandum from the trial judge that he interviewed the juror in question * * *." This memorandum is not a part of the record herein and was unknown to defendant prior to the Opinion of this Court.

Defendant has searched the records of this Court and of the Court below and certifies that neither contains a docket entry of a memorandum of the trial judge. The transcript of the judge's remarks on the day sentence was pronounced indicates, however, that he then announced that he had interviewed the stricken juror many days after verdict; that he solicited a letter from her and had made the same a part of the record herein. Defendant's counsel made objection to that on the grounds that the Court was without authority to include in the record any document or statement procured at the Court's solicitation, without notice to, or without the presence of defendant or his counsel. The very thought that records in proceedings in Courts of law may be embellished in such a manner is repugnant to our concept of constitutional judicial procedure. The act of the Court, in interviewing a juror after the completion of the case, without notice to defendant or his counsel, in aid of sustaining the Government's position is further indication of the role of an active advocate assumed by the Trial Court throughout the proceedings, as heretofore charged by defendant. The Court became an investigator to obtain evidence rather than maintaining his position as the tribunal to whom the proof should be brought. The error of such a position of advocacy, in the words of the Supreme Court, is set forth on pages 56, 57 and 58 of defendant's brief.

IV. Bill of Particulars

Defendant respectfully submits, that an application for particulars made solely for the purpose of securing information supplemental to the allegations of an indictment, insufficient on its face so that the defendant might be "informed of the nature and cause of the allegation" does not permit the exercise of any discretionary latitude, but creates a mandatory duty upon the Trial Court either to order the particulars or dismiss the indictment.

Defendant, upon denial of his motion for complete particulars, moved for an order dismissing the indictment. That motion was denied.

This Court does not determine the sufficiency of the indictment in light of the Trial Court's denial of complete particulars, and makes no reference thereto in its Opinion; although that point was raised by defendant. Defendant urges that the discretionary power of a trial judge, in its ordinary concept in reference to bills of particulars, extends only to questions relating to enlargement of "the nature and cause" of an offense properly charged in an indictment; and never to the question of granting or denying to defendant his right to be as fully informed as is guaranteed by Article VI of the Amendments to the Constitution.

To hold that it is within the discretion of a Trial Court to grant or deny particulars as to an insufficient indictment is to say that a trial judge has it within his power to determine whether or not a defendant should receive the guarantees of the Constitution.

In the *Matter of Capone* v. *United States*, 56 F. 2d 927, (7 Cir. 1932), cited by both parties, the Court held that the indictment would not be dismissed since the defendant did not move for particulars below; and in effect, intimated that if defendant had, and his motion was denied, that the

indictment may have been dismissed. There, the decision rested upon the failure of defendant to exert his rights below, making it unnecessary for the Appellate Court to go beyond that question; here, the Court notices defendant's motion for particulars but has failed to consider defendant's alternative point, namely, that upon the Court's denial of complete particulars, an order dismissing Counts 1 to 5, inclusive, should have been granted. Defendant urges, respectfully, that this Court notice and decide the full purport of his point 1 (p. 6).

V. Statute of Limitations

The Statute of Limitations is enlarged to the extent that it is said to begin to run from a date nowise relevant to the commission of the crime charged. The crime charged in Count 1 involves affirmative acts of commission by defendant during the calendar year 1946, as is alleged in the indictment.

This Court, gives as its sole reason for deciding that the Statute did not begin to run until March 15, 1947, "The Government answers, however, that the alleged offense concerning the 1946 tax did not become complete until March 15, 1947. This was the *day when payment became due*, it says, and, therefore, the Statute did not start to run with regard to the year 1946 until the March 15th following. We agree." There is no allegation in the indictment of failure to pay the tax for the year 1946; no proof was offered as to that; and that failure is not an element of the offense charged.

If defendant were guilty of the three affirmative acts of commission charged, he could not have absolved himself from guilt by subsequently on March 15, 1947 or before, filing a correct income tax return and therefore the failure to file, after the completion of the crime cannot extend the Statute.

VI. Election Between the Evasion Counts and Wrongful Failure to File Counts

That the Court did not apply the law, as it determined it to be, to the factual situation:

Defendant recognizes as the Court holds in its Opinion, that *Pereira* v. *United States,* 347 U. S. 1, 9 (1954), recently reiterated the governing rule as to double jeopardy, and rests his argument as to this point upon the rule therein stated.

The Supreme Court in that matter sanctioned convictions of two separate offenses even though the charges arose from a single act or series of acts, and this Court quotes therefrom "so long as *'each'* requires the proof of a fact *not essential to the other.*" Applying that quoted rule, this Court held (p. 7), "The short answer * * * is that the rule, itself, as quoted above, sanctions the use of one act as *'part'* of the proof of *'both'* offenses."

The indisputable fact in this matter is that while the wilful failure to file was introduced in evidence as *"part"* (more being required) of the offense under Section 145(b), the identical wilful failure to file, without proof of any other act, *alone,* was relied upon and affirmed as the basis for the conviction under the Section 145(a) offense. If the offense charged under 145(a) required any additional proof, other than the wilful failure to file, and the wilful failure to file was merely a *part* of that offense, as was the fact in regard to the Section 145(b) offense, defendant would make no complaint as to this point.

VII. The Evidence Supports the Verdict

As to this point, the Government states that it spent a great deal of time, by its representatives and agents, in determining defendant's income because of the inadequacy of his records and because defendant had kept money for clients, his own fees, and receipts from capital transactions without separating them in bank accounts.

This Court tacitly accepts this by saying "Defendant had failed to keep sufficient records to allow an audit of his receipts and expenditures in the ordinary way. The extent of his income had to be proved by showing how much he had taken in. This was a difficult task * * * ", making it appear that the great amount of time consumed by the Government's investigation was due to defendant's inadequate records. Defendant submits that the transcript of testimony proves conclusively that actually it was due to *verification* of defendant's records, at the banks, in the Courts, and in the records of each and every client and other person with whom defendant had transacted any business during the five years involved; and that the result was a complete failure to disclose any unrecorded income, false representation or concealment. The investigation resulted in failure—the verification in complete agreement with defendant's records, representations, and disclosures.

The testimony of the two agents who conducted the investigation in this matter, and who were the only witnesses adduced as to this phase of the case, directly contradicted the theory of the Government, as defendant believes the argument in his brief as to Point VII (pp. 29 to 43) amply demonstrates.

Mr. Levere A. Thompson, Special Agent of the Intelligence Division, admitted that defendant had fairly complete records as follows:

"*By Mr. Kafes* (D184a):

Q. Now I ask you whether or not a person's bank account, deposit slips, cancelled checks, stubs, diary entries, and other notations do not constitute a fairly complete set of records? A. They would constitute—what did you say, fairly what?

The Court: A fairly complete set of records.

A. Fairly complete if they are complete.

Q. Did you find any evidence under any circumstance or from any source that the records which I did have weren't complete? A. I would say that I found a couple of items, at least one that would not show up on your records."

Mr. Richard G. Heller, the agent in charge, testified as follows (D337a-338a):

"*By Mr. Kafes*:

Q. In other words, everything that I told you the other agents wanted to *verify* to see, if, possibly, I had made some untruthful disclosure to you, or that I *failed* to *disclose* something to you. A. Well, that would be—

Q. Isn't that a fair thing to say? A. Yes, sir.

Q. Now, I ask you directly, Mr. Heller, whether or not in your 113 days you found anything that I said to you to be not true in the slightest degree? A. Well, I know of no particular instance other than room for error, but nothing untrue."

And at page D340a:

"Q. Now, Mr. Heller, I ask you whether or not you in your 113 days, and the other agents with as much time as they spent, whether you were able to uncover, if I may use that word, or find one penny of

income that I had which I did not *report* to you and which, except in the case of the $225, did not get into my bank account? A. I don't recall *any* item of that type, sir."

The fact that defendant was able, from the records in his office, to disclose to the agents his complete income, as is admitted, would seem to indicate that he did not attempt to conceal any monies that came to him. He deposited much greater sums of money in his personal bank account than was his income—not less. The Government charged that every deposit in defendant's bank account was taxable income unless defendant could conclusively show that the deposit was not taxable income. This is regular Internal Revenue procedure and redounds to the favor of the Government and certainly is not criminal. It will be noted by the Government's answer to the one particular ordered that no specific form of records is required. The only mandate is that a person have *such* records as will enable the Government to determine taxable income. The agents admitted that defendant, from his various records, was able to do that.

Questions of fact are completely for the jury. On the other hand, a jury cannot arbitrarily arrive upon a verdict, without the record disclosing such evidence as would justify the conclusion it reached. Here the Government's witnesses, by their direct testimony, contradict the jury's findings.

Mistrial

Although it is said in the Opinion, "We have considered all his points on appeal * * * " (p. 8), the Court does not notice or decide defendant's point VI, "That the Court below erred in denying defendant's motions for a mistrial." Defendant believes that the questions involved

under this point go directly to his Constitutional guarantee of a fair trial and urges this Court to decide the questions involved.

Defendant therefore prays that this Honorable Court may Order a Rehearing of the issues involved in the within cause.

Respectfully submitted,

KAHN AND SCHILDKRAUT,
Attorneys for Appellant.

J. RICHARD KAYES, *Pro Se.*

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 386

J. RICHARD KAFES, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the district court denying the motion for a judgment of acquittal (Supp. R. 114-119) [1] is not reported. The opinion of the court of appeals (Pet. 1a-9a) is reported at 214 F. 2d 887.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1954 (Pet. 10a). A petition for rehear-

[1] Record references to the printed appendices are designated "R." to indicate the separate appendix for petitioner, and "Supp. R." to indicate the separate appendix for the United States of America.

ing was denied on August 6, 1954. On September 1, 1954, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Burton to October 5, 1954. The petition was filed on October 5, 1954. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the conduct of the trial judge was improper and denied petitioner a fair trial.

2. Whether the evidence of affirmative action was sufficient to establish an "attempt" within the meaning of Section 145(b) of the Internal Revenue Code of 1939.

3. Whether the trial court abused its discretion in its partial denial of petitioner's request for a bill of particulars.

STATUTE INVOLVED

INTERNAL REVENUE CODE OF 1939:

SEC. 145. PENALTIES.

(a) [As amended by Sec. 5(c), Current Tax Payment Act of 1943, c. 120, 57 Stat. 126] *Failure to file returns, submit information, or Pay Tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax

imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

STATEMENT

On February 24, 1953, a seven-count indictment was filed against petitioner, a resident of Trenton, New Jersey, in the United States District Court for the District of New Jersey. (Supp. R. 1-6.) The

first five counts charged that, in each of the years 1946 through 1950, petitioner willfully attempted to evade his income taxes, in violation of Section 145(b) of the Internal Revenue Code, by failing to file income tax returns, by concealing his income, and "by handling his affairs in such manner as to avoid making the records usual in the transactions in which he participated so as to conceal and mislead with respect to his true taxable income." The amounts of net income and tax deficiency were alleged in Counts 1 to 5 to be as follows:

	Net Income	Tax Paid[2]	Tax Withheld[3]	Tax Due
Count I (1946).....	$76,408.57	$1,200.00	0-0	$42,975.89
Count II (1947).....	17,627.12	0-0	0-0	5,237.88
Count III (1948).....	43,201.11	0-0	$350.00	18,216.28
Count IV (1949).....	26,699.72	0-0	450.00	8,721.45
Count V (1950).....	13,007.94	0-0	450.00	2,561.59
Total.....	$176,944.46	$1,200.00	$1,250.00	$77,713.09

Counts six and seven charged petitioner with willful failure to file income tax returns for the years 1949 and 1950, in violation of Section 145(a) of the Code. (Supp. R. 5-6.)

After a jury trial lasting eight days, petitioner was found guilty as charged (R. 3), and on June 26, 1953, he was sentenced to imprisonment for a period of one and one-half years on each of Counts One to Five, inclusive, and to imprisonment for a period of one year on each of Counts Six and Seven,

---

[2] Estimated taxes paid by petitioner for the calendar year 1946. (R. 29.)

[3] Taxes withheld by the State of New Jersey from annual salary paid to petitioner as a member of the New Jersey State Assembly (1948) and Senate (1949 and 1950). (R. 70-72.)

all terms of imprisonment to run concurrently. (Supp. R. 89-90). The court of appeals affirmed. (Pet. 1a-10a.)

The evidence to support the verdict may be summarized as follows:

Petitioner has been a member of the bar since December 19, 1924. (R. 38, 41.) During the period covered by the offenses charged, he was a practicing attorney with law offices in Trenton, New Jersey. He was also, successively, a member of the New Jersey State Assembly and of the New Jersey State Senate. (R. 70-72; Supp. R. 283-286.) In addition, he was a director of the Chicago and Eastern Illinois Railroad Company and was engaged in other businesses. (R. 38, 61-62.)

Petitioner had no formal books or records. He had no cash receipts journal, no cash disbursements journal. (R. 160.) There was no listing of the fees which he received. He did not keep a ledger. (Supp. R. 209.) Except for scattered memoranda, his only record of receipts until September, 1949, consisted of bank statements showing unidentified bank deposits. (Supp. R. 209.) In September, 1949, he commenced keeping a record of cash receipts, which consisted of duplicate copies of receipts given by him to others. (R. 160.)

The investigating agents were unable to determine the entire amount of petitioner's income. (R. 159, 169-170.) Petitioner did not deposit all of his receipts. (R. 103-105, 110, 115-116.) He omitted certain receipts from the record commenced in September, 1949. (R. 162-163.) To approximate

the amount of income, the Internal Revenue Agent, with some assistance from the Special Agent and petitioner, spent one hundred and thirteen days studying such records as were available. (Supp. R. 263.)

The amount of net income for each year was established by the bank-deposits method (R. 66-70, 86-87, 90-116, 144-155) as corroborated by the specific-items method of proof (R. 55-65, 70-89, 116-142). From bank deposits were eliminated trust funds and non-income items. (R. 235-250.) Undeposited income was added and deductible expenses were subtracted to determine the total net income. (Supp. R. 176-263.) A substantial amount of the net income thus established was corroborated by stipulations and by the testimony of fourteen witnesses regarding specific items of income paid to petitioner. (R. 55-65, 70-89, 116-142.) In the final analysis the tax deficiency established for the five years amounted to $64,013.65. (R. 384-387.)

As evidence of active concealment, it was shown that petitioner mingled the funds of his clients with those in his own bank account (R. 237, 244-245; Supp. R. 194, 225-226, 251.) It also appeared that petitioner established a separate bank account in New York City upon which to draw funds in favor of the Collector of Internal Revenue (R. 66-67, 86-87, 197; Supp. R. 314); that deposits to this account were made on March 14, 1945, when the account was established, and on April 15, 1946 (R. 66); that the deposit on April 15, 1946, was in the form of $5,000 cash and a $2,000 check drawn on

petitioner's regular bank account in New Jersey (R. 67; Supp. R. 282); that, nine days thereafter, a check made payable to the Collector of Internal Revenue in the sum of $6,639.91 cleared the bank (R. 86, 197; Supp. R. 314); that the deposit and withdrawal indicated were the only entries on the transcript of the account for the year 1946 (R. 67, 198; Ex. G-12); and that there were no additional deposits made to this account for any succeeding year (R. 90-91, 236; Supp. R. 194, 210, 224, 247).

It was shown further that at about the same time, *i. e.*, on April 25, 1946, petitioner estimated that his 1946 income taxes would amount to $1,200 and he made such a declaration together with the first of two $600 installment payments (Supp. R. 167, 171, 173). The testimony of ten witnesses and evidence in the form of cancelled checks established that between January 1, 1946, and December 12, 1946, petitioner had been paid $52,908.19, of which $49,258.33 was for legal services and $3,649.86 was an allowance for expenses (R. 56, 59, 63, 71, 74, 76-79, 118-119, 129, 136, 143-144; Supp. R. 279-281, 283, 287, 295-299, 304, 306). Without amending his earlier declaration of April 25, 1946, petitioner, on December 12, 1946, made the final installment payment in the sum of $600. (Supp. R. 167.)

Additional acts of concealment were shown: Petitioner commenced to keep a record of some but not all of his receipts (R. 162-163; Supp. R. 248); he cashed some checks and did not clear them through his bank account (R. 82, 89, 110-111, 238-239; Supp. R. 290, 292, 293); and he disclosed to the investi-

gating agents some but not all of his fees from associate counsel (R. 128-129, 169-170; Supp. R. 302-304).

Failure to file timely income tax returns occurred for each of the prosecution years. When interviewed on November 25, 1952, petitioner was asked why he had not filed any tax returns for the years 1946 through 1950. He replied that he "didn't have the money to pay what was due" so he "didn't file." (R. 158.) On February 24, 1953, the day that petitioner was indicted, delinquent returns were filed for 1949 and 1950. (R. 348; Supp. R. 264, 267.)

ARGUMENT

1. Petitioner's major contention with respect to the fairness of his trial is that the district court made various statements and asked various questions of witnesses which reflected friendliness to the Government's case and hostility to petitioner's. (Pet. 7-15.)[4] Almost all of the statements which are said to show this attitude were made in conjunction with the court's rulings.

It is to be noted at the outset that petitioner conducted most of his own defense. He frequently asked questions which were argumentative (*e. g.*, R. 185), interrupted witnesses (*e. g.*, R. 169) and the court (*e. g.*, R. 154), questioned the court's authority to interrogate witnesses (*e. g.*, R. 349-350), and made self-serving declarations unsubjected

[4] The further claim that the court's charge was unfair (Pet. 13) in that it dealt inadequately with the evidence bearing on one narrow point is obviously insubstantial.

to oath or cross-examination (*e. g.*, R. 286). And he took issue zealously with numerous rulings of the court. A fair reading of the record discloses that such admonitions and reprimands as petitioner received were prompted by his own conduct and were moderate in character. That there would be some clashes in the give-and-take of a lengthy and sharply contested trial—particularly one in which the defendant vigorously participated as an advocate—was inevitable.

A federal trial judge, of course, is not a mere moderator. He presides over the proceeding for the purpose of assuring its proper conduct and of determining questions of law. It is his duty to admonish counsel when necessary, provided that he does so temperately. And he has the power to examine witnesses in order to elicit the truth. *Quercia* v. *United States*, 289 U. S. 466; *Glasser* v. *United States*, 315 U. S. 60; *Fredrick* v. *United States*, 163 F. 2d 536 (C. A. 9th), certiorari denied, 332 U. S. 775; *United States* v. *Aaron*, 190 F. 2d 144 (C. A. 2d), certiorari denied, 342 U. S. 827.

That the court did not go beyond what was necessary and proper in the performance of these duties is amply attested by Judge Goodrich's carefully considered opinion, based upon a full reading of the record. He stated (Pet. 2a-3a):

> * * * Obviously the way to investigate this matter is not on the basis of the quotations here and there from colloquies between judge and counsel over an eight-day trial, but to read the report of the proceedings as the trial went on.

When this is done the allegations that the defendant did not get fair treatment are not supported. The defendant, who is a member of the bar, conducted most of his own defense. As would be expected under the circumstances, he endeavored to take advantage of all points which he conceived to be in his favor. There were numerous exchanges of remarks between the court and the defendant whose position on some legal points was quite different from that of the judge. Occasionally the judge reproved defendant, but he also assisted him at times in phrasing a question to bring out a point. He allowed very great freedom in cross-examination of the government's witnesses. The impression from the reading of a long record is that the trial was conducted with fairness and with as few clashes as this type of litigation would be expected to produce. * * *[5]

2. The contention that a willful attempt to conceal was not established ignores the evidence. As

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[5] As the opinion also points out (Pet. 3a), the trial judge instructed the jury:

> If, during the trial of the case, it was necessary for the court, in a legal fashion, to rap the knuckles of either one of these gentlemen (counsel), that has absolutely nothing to do with the case in the slightest respect because they were advancing their own particular theory of the case as they, as lawyers, must do. So that has nothing to do with it. * * *

Petitioner's assertion (Pet. 14) that this "was said not for the purpose of impressing the jury but with the view of embellishing the record" does not merit comment.

previously shown (*supra,* pp. 6-8), petitioner mixed his funds with those of his clients and kept no books of account to distinguish them; he created and used a separate bank account in a different state solely for the purpose of remitting his last tax payment; he in effect ratified an unamended declaration of estimated income tax when he knew that it reflected a vast understatement of income; and he kept and rendered incomplete data.

An affirmative willful attempt to evade and defeat one's income tax may be established by showing "concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal." *Spies* v. *United States,* 317 U. S. 492, 499. Thus, evidence of concealment may be found in mingling personal and non-personal funds in one account without separately identifying them as to source; using more than one bank account in an effort to hide certain transactions; bolstering a false return with a misleading act or statement subsequent thereto; and the keeping and rendition of incomplete financial data. *Spies* v. *United States, supra; United States* v. *Beacon Brass Co.,* 344 U. S. 43; *United States* v. *Johnson,* 319 U. S. 503; *Oliver* v. *United States,* 54 F. 2d 48 (C. A. 7th), certiorari denied, 285 U. S. 543; *United States* v. *Chapman,* 168 F. 2d 997 (C. A. 7th), certiorai denied, 335 U. S. 853.

3. Although the indictment for each year (Supp. R. 1-6) alleged petitioner's willful attempt to evade

and defeat his income tax (1) by failing to file
income tax return, (2) by concealing his inco
and (3) by handling his affairs in such a manne
to avoid making the records usual in the trans
tions in which he participated so as to conceal
mislead with respect to his true taxable inco
petitioner contends (Pet. 20-21) that the cha
was too vague and that his motion for a bill of p
ticulars (Supp. R. 7-9), allowed in part (Supp.
27, 41-42; R. 5-6), should have been granted *in t*

The argument is without merit. During the t
petitioner did not claim surprise nor request a c
tinuance. Nor has he since shown how he was h
by the lack of additional particulars. A bill of p
ticulars should be granted if necessary to protect
accused from a second prosecution for the sa
offense, or to enable him to prepare his defense
avoid surprise. There is no showing that either
these circumstances was present here or that th
was any abuse of discretion by the court. See *W*
Tai v. *United States*, 273 U. S. 77; *Price* v. *Uni*
States, 68 F. 2d 133 (C. A. 5th), certiorari deni
292 U. S. 632; *Norris* v. *United States*, 152 F.
808 (C. A. 5th), certiorari denied, 328 U. S. 8
United States v. *Caserta*, 199 F. 2d 905 (C. A. 3

CONCLUSION

The decision of the court below is clearly correct, and no question warranting review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
DAVID L. LUCE,
JOSEPH M. HOWARD,
DICKINSON THATCHER,
Special Assistants to the Attorney General.

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